VII. The "unclean hands" rule (which the three-Judge Court applied adversely to the 139 Companies) cannot bar them from their right to a decision on the merits with respect to the 16-2/3% Rate Increase (p. 122, infra), because:

(1) All facts connected with the Street-Pendergast-O'Mailey fraud—and all facts of which the three-Judge Court held the 139 Companies had "implied" knowledge —(a) occurred five years after the 139 Companies filed their suits in the Federal Court asking equitable relief, and (b) have no relationship whatever to the 139 Companies' asserted right to a 16-2/3% Rate Increase (1930-1935), and to the impounded funds representing that increase;

(2) The "unclean hands" doctrine does not destroy the plaintiffs' [139 Companies'] right to the equitable relief prayed for in their Bills in Equity, where the alleged (but denied) fraudulent conduct (a) happened after the beginning of the litigation, and (b) is not required by the plaintiffs as an aid to the establishment of their original claim to equitable relief.

In Re Meyerfeld, 46 F. (2d) 665.

Shaver v. *Heller & Merz Company*, 108 F. 821 (C. C. A. 8).

Smith v. *Ajax Pipe Line Co.*, 87 F. (2d) 567, 568 (C. C. A. 8th).

Olsness v. *Home Ins. Co.*, 14 F. (2d) 907 (C. C. A. 8th).

Keystone Driller Co. v. *General Excavator Co.*, 290 U. S. 240.

Primeau v. *Garfield*, 193 F. 911.

VIII. The "unclean hands" doctrine has no application here, because in these proceedings, as defined by the three-Judge Court, the 139 Companies are actually defendants (p. 129, infra).

Shoe Co. v. *Wyble*, 261 Mo. 675.

Rude v. *Buckhalter*, 54 F. (2d) 834.

SEVENTH POINT.

The "unclean hands" rule (which the three-Judge Court applied adversely to the 139 Companies) cannot bar them from their right to a decision on the merits with respect to the 16-2/3% Rate Increase, because:

(1) All facts connected with the Street-Pendergast-O'Malley fraud—and all facts of which the three-Judge Court held the 139 Companies had "implied" knowledge —(a) occurred five years after the 139 Companies filed their suits in the Federal Court asking equitable relief, and (b) have no relationship whatever to the 139 Companies' asserted right to a 16-2/3% Rate Increase (1930-1935), and to the impounded funds representing that increase;

(2) The "unclean hands" doctrine does not destroy the plaintiffs' [139 Companies'] right to the equitable relief prayed for in their Bills in Equity, where the alleged (but denied) fraudulent conduct (a) happened after the beginning of the litigation, and (b) is not required by the plaintiffs as an aid to the establishment of their original claim to equitable relief.

[Vol. A p. 493; IV.]

Up to this point, we have devoted substantially our entire BRIEF to one factual question, to-wit, whether or not any of the Companies knew facts which should have placed them on inquiry regarding Street's conduct. We did this in order that the Court might have a clear understanding of the facts.

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There is a principle of law (not previously discussed) which, when applied to the undisputed facts in the 137 Cases, would make it unnecessary for this Court to determine any other question in the Case.

In 1930, the 139 Companies entered the District Court with "clean hands." On filing their suits a legitimate

controversy arose as to (*a*) the confiscatory nature of the old rates, and (*b*) the legality of the 16-2/3% increased rates, from which the impounded funds were accumulated.

During nearly five years of litigation, hundreds of witnesses, thousands of pages of testimony, and the Master's Reports in each case, all supported the Companies' contentions (p. 5, 28, *supra*).

There was never a suggestion that the Companies or any one else—not even Street—had been guilty of any possible kind of fraud or other wrongful conduct. The cases were simply awaiting the three-Judge Court's long deferred (14 months) decision on the Record as it stood on final submission. It all rested in the breast of the Court as a matter for legal decision. Nothing thereafter done could affect the Companies' right, or lack of right, to the equitable relief originally prayed for.

Thereafter, January—February, 1935, Street-Pendergast-McCormack-O'Malley entered into a wicked conspiracy to obtain money from the Insurance Companies under the guise of legitimate expenses for a settlement of the litigation for the purpose of enriching Pendergast—and through him O'Malley (p. 74-78, *supra;* OTIS, J.'s charge to Grand Jury, Reprint p. 63, 65, 66).

That wicked conspiracy (whether successful or abortive) (1) had no relationship whatever to sustaining the Companies' right to a decision on the merits regarding the equitable relief sought and the right to the impounded funds; (2) did not, and does not, inhere in, or in anyway aid in, the support of the Companies' causes of action, (3) was, and is, wholly *unrelated* to the plaintiffs,' or defendants' title to the impounded funds. The right or title to the impounded funds depended exclusively upon whether the old rates were confiscatory.

The validity of the old rates, or the right to the increased rates, depended upon many factors; but neither could possibly be affected, one way or the other, by the Street-Pendergast-O'Malley fraud, occurring, as it did, long *after* the increased rates were charged and collected, and

not related in any way to any of the factors controlling the confiscatory nature, or legality, of either the old or the new rates.

The Street-Pendergast-O'Malley conduct was fraudulent, criminal, contemptous of the Court, and the parties engaged in the fraud should be punished by the criminal laws.

Neither the 139 Companies, nor the policyholders, should be permitted to obtain or to retain any fruits of the fraud.

The 139 Companies on learning of the frauds repudiated the Decrees and all benefit thereunder; and restored to the Court, not merely what they received under the Decrees, but also what had been paid to the Superintendent for the State's expenses and his counsel fees (and was unrecoverable). The 139 Companies renounced, and have not retained, any fruits of a fraud to distribute the impounded funds, by a bribed agreement, instead of by a judicial decision. On the other hand, the Superintendent (*a*) *holds on* to all the fruits of the fraud,[65] and (*b*) wants to obtain *new and additional fruits* of the same fraud[66]—which, in other words, means that he wishes to obtain $8,000,000 for the policyholders as the result of the Street-O'Malley fraud.

Therefore, it is the Superintendent acting for the policyholders, and *not* the Insurance Companies, who is seeking an *"unjust enrichment"* flowing from the frauds.

With that factual understanding, what is the law regarding "unclean hands" upon which the three-Judge Court rejected the Insurance Companies' right to a decision and summarily gave the entire funds to the policyholders?

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[65]He holds on to $593,040 of the impounded funds, of which $423,600 went to pay his attorneys' fees and $169,440 to pay the expenses of his litigation (p. 16, *supra*).

[66]He desires to obtain (as the result of the fraud of his predecessor in office as a State official), the title to the rest of the impounded funds amounting to approximately $8,000,000 without any legal decision as to the ownership thereof.

The "unclean hands" doctrine does not apply here. It does not destroy a party's right to a decision on the merits, where the "unclean" acts complained of (*a*) happened during the progress of the litigation, and (*b*) were extrinsic to, and did not inhere in, the original cause of action.[67]

Even if the Companies knew of, or had closed their eyes to, the Street fraud **(which of course they absolutely deny and of which there is not a scintilla of proof)**, the "unclean hands" rule does not support the three-Judge Court's action (1) *in refusing to decide* the cases, which they had held under submission for more than a year before the fraud was committed, and (2) in ordering a summary distribution of the $8,000,000 "impoundings," to the policyholders. This is because, as stated in 4 A. L. R. (p. 60):

> "If a cause of action in its inception was meritorious, the fact that the complainant in the suit, has during its continuance been guilty of inequitable conduct, will not prevent his recovery of the relief prayed, provided such conduct 'does not go to the cause of action.' "

A party has the right to a determination of his claim on the merits, despite his *subsequent* fraudulent conduct

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[67]*Chute* v. *Wisconsin Chemical Co.*, 185 Fed. 115, 118; *In re Meyerfield*, 46 F. (2d) 665, 666; *Smith* v. *Ajax Pipe Line Co.*, 87 F. (2d) 567, 568 (C. C. A. 8th); *Small* v. *Heywood-Wakefield*, 21 F. S. 697, 700; *Barnes* v. *Barnes*, 282 Ill. 593; *Chicago* v. *Union Stock Yards & Transit Co.*, 164 Ill. 224; 1 Pomeroy's Eq. Jur. 5th Ed., Sec. 399; 10 R. C. L., Sec. 140; 4 A. L. R. p. 60; *Trice* v. *Comstock*, 121 Fed. 620 (C. C. A. 8th); *Olsness* v. *Home Ins. Co.*, 14 F. (2d) 907 (C. C. A. 8th) *Oscar Barnett Foundry Co.* v. *Crowe*, 219 Fed. 450 (C. C. A. 8th); *American Sugar Refining Co.* v. *McFarland*, 229 Fed. 284, affirmed 241 U. S. 78; *Camors-McConnell Co.* v. *McConnell*, 140 Fed. 412 (C. C. A. 8th); *Talbot* v. *Independent Order of Owls*, 220 Fed. 660 (C. C. A. 8th); *Baker* v. *McCarl*, 24 F. (2d) 897; *Cunningham* v. *Pettigrew*, 169 Fed. 335 (C. C. A. 8th); *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240; *Stegman* v. *Weeks*, 279 Mo. 131, 139; *Bateman* v. *Fargason*, 4 Fed. 32, 33; *Goodyear Tire & Rubber Co.* v. *Overman Tire & Cushion Tire Co.*, 95 Fed. (2d) 978.

in attempting to get all, or a part, of his claim by wrongful methods. The Courts customarily apply that principle without comment.[68]

There is a proper way [through indictment] to punish such conduct; but such punishment does not permit closing the Court's doors even to a guilty party.

In Re Meyerfeld, 46 F. (2d) 665, Meyerfeld, the bankrupt, held some property in his name which was actually owned by Levy, who had furnished the money for its purchase. Meyerfeld's Trustee in Bankruptcy proposed to sell all property standing in Meyerfeld's name, including the property that was claimed by Levy. In attempting to prove that the property belonged to him, Levy produced a forged deed conveying the property in question from Meyerfeld to himself. But Levy had actually paid for the property, and was entitled to a resulting trust. The Referee refused to enforce a resulting trust in Levy's behalf, because of his "unclean hands" in forging the deed. The Court overruled the Referee, enforced the trust, and held that Levy was not barred because of the "unclean hands" doctrine, saying (p. 666):

"Reprehensible though Levy's conduct may have been, I am constrained to hold that the referee erred in denying him all relief because he came into equity with unclean hands. *The transaction by which the resulting trust was created was not tainted with fraud, illegality, or unconscionable conduct on his part* . . .

"The applicable principle is well stated in *Barnes* v. *Barnes*, 282 Ill. 593, where a plaintiff had fabricated evidence to support various items in an account, but had established her right generally to an accounting in equity; 'He who comes into a court of equity must come with clean hands, and one who does iniquity cannot have equity; but *that maxim is limited in its application to*

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[68][*White* v. *Crow*, 110 U. S. 183, 187; *National Surety Co.* v. *State Bank*, 120 F. 593, 598-599 (C. C. A. 8th); *William Lane, Inc.*, v. *Shelby Shoe Co.*, 45 F. (2d) 581, 582 (C. C. A. 2d).]

where the substance of the thing is inequitable, and the iniquity must apply to the particular subject-matter. It is not sufficient to bar relief that inequitable conduct should relate to the proof of some item or some fact, and *where the origin of the claim is not inequitable, a fraudulent act in relation to it will not bar relief*" [Citing cases].

This misconduct, which will repel a plaintiff from a court of equity, must inhere in, and infect, the cause of action which the plaintiff seeks to enforce. It must have an immediate and necessary relation to the equity for which the plaintiff prays in respect of the matter in litigation. The "unclean hands" doctrine cannot be applied where the alleged misconduct (i) occurred *after* the institution of a suit and (ii) had *no relation* to the equitable relief which the plaintiff sought. In *Primeau* v. *Garfield,* 193 F. 911 (cited by the three-Judge Court in its opinion), the Court said:

> "The real test in such a case as this is whether the plaintiff requires any aid from the fraudulent transaction to establish his demand."

In *Shaver* v. *Heller & Merz Company,* 108 F. 821 (C. C. A. 8), the Court said (p. 834):

> "The principle that 'he who comes into equity must do so with clean hands' is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The iniquity which will repel him must have an immediate and necessary relation to the equity for which he sues."

The three-Judge Court argued that it would be fantastic to *have the power* to throw a case out of court, because the plaintiff *entered* with "unclean hands," and yet not to have the *power* to throw the plaintiff out of Court, if the unconscionable conduct occurred *after* it was filed, but while the case was still progressing before the Court.

That argument is "bad law"; and it is opposed to the settled principles of equitable jurisprudence, which the three-Judge Court must follow; and it cannot create new concepts contrary to the established rules of equity.[69]

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[69]21 C. J., Sec. 12, p. 34, 35, and note 7-A.